In the
Supreme Court of the United States

OCTOBER TERM 1961

No. 827

LIBRADO SEDA ALVAREZ,
PETITIONER,

v.

THE PEOPLE OF PUERTO RICO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MELVIN S. LOUISON
LEONARD LOUISON
8 Taunton Green
Taunton, Massachusetts
Counsel for Petitioners

Of Counsel:
YAMIL GALIB-FRANGIE
P. O. Box 236
San German, Puerto Rico

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Petitioner, Librado Seda Alvarez, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on March 1, 1962.

Opinions Below

The opinion of the Court of Appeals (App. A, infra, P. 22) is not as yet reported. The opinion of the Supreme Court of Puerto Rico is not as yet officially reported in the English language, but a translated opinion appears at Pages 31-44 of the Record-Appendix filed in the Court of Appeals

and filed herewith in one certified and nine additional copies, pursuant to Rule 21 of the Rules of this Court.

Jurisdiction

The judgment of the Supreme Court of Puerto Rico was affirmed by a Per Curiam opinion of the Court of Appeals. The judgment of the Court of Appeals was entered on March 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a police officer acting as an undercover agent and wearing civilian clothes may lawfully enter the home of a citizen without a warrant in order to gather evidence for use at a subsequent criminal trial of that citizen under the Search and Seizure and Due Process provisions of the Federal Constitution.

2. Whether the arrest of a citizen on a charge of a misdemeanor can be delayed for a period of more than six (6) full months under principles of due process of law when the government at all times during the six months has knowledge of, and evidence of, the alleged commission of the offense and the identity of the alleged misdemeant from a police officer acting as an undercover agent, and the alleged misdemeant is at all times available for service of process.

3. Whether a predetermined design by a police officer acting as an undercover agent, not to make arrests when crimes are committed in his presence in order to gain evidence against the greatest number of persons possible, excuses production of primary evidence of the commission of an offense so that it may be examined by a magistrate.

4. Whether the interpretation of 34 L.P.R.A. §3 by the Supreme Court of Puerto Rico permitting a different prosecutor to file an information from the one who took the sworn statements from the witnesses to the offense contravenes the due process provisions of the Federal Constitution.

Statutes Involved

The statutory provisions involved are the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; the Puerto Rican Bolita Act—Act 220 of May 5, 1948, Sec. 4 (33 L.P.R.A. §1250); and the Code of Criminal Procedure, Sec. 3 (34 L.P.R.A. §3). All applicable statutes or provisions thereof are set forth in Appendix C, infra, pp. 24-26.

Statement

The petitioner was convicted on multiple informations charging him with violation of §4 of the Bolita Act of Puerto Rico (number pool gambling).

1. In this case after the informations were filed, petitioner filed motions for particulars (R. 6) which were allowed (R. 7). In response thereto, the Government filed the affidavit of Police Officer Hector M. Calero, which is set forth in full at pages 2-3 of the Record-Appendix. The portion thereof material to this question is as follows:

> "That I have been entrusted a confidential mission. That I dress as a civilian at all times so as to be able to comingle with the persons in the place where I am on duty and the instructions I have received are not to make an arrest when the law is violated in my presence, but rather to obtain evidence against the

greatest number of persons possible and then to submit same to the consideration of an examining magistrate."

A motion to suppress the evidence of Officer Calero was filed based on violation of constitutional rights (R. 8) and denied after hearing (R. 9). The case was then submitted to the trial judge [1] as a case stated. The *only* evidence offered to support the government's case was Calero's affidavit (R. 14), together with a stipulation from government counsel that no search warrant was obtained before entry was gained into petitioner's home.

2. The Supreme Court of Puerto Rico had before it all the affidavits of Officer Calero filed with each of the nineteen informations filed against the petitioner. That court noted that "except for the date of the violation, the pertinent part of the sworn statement of policeman Calero" was the same as each other, and that the date of the first offense was May 9, 1959 (R.A. 33). The affidavit in this Record pertains to the date of the last offense, September 12, 1959. The date on which the informations were filed was December 18, 1959.

The section of the Bolita Act in question states that an offender " . . . shall be immediately arrested. . .". (See Appendix C, p. 25).

3. Policeman Calero stated in his affidavit that he bought ticket No. 935 from the petitioner (R.A. 2); that the petitioner entered the number on a piece of wrapping paper in a manner "used in the illegal game of *Bolita*" (R. 3); and that the petitioner did not give him the ticket number "for which reason [he] cannot present physical evidence in this case".

4. In this case, policeman Calero gave his sworn state-

[1] Under the Bolita Act, 33 L.P.R.A. §1250, there is no right to a trial by jury for a misdemeanor. (See Appendix C, pp. 25-26).

ment to District Attorney Luis Angel Limeres (R. 3); the information was signed by Agustin Mángual Hernandez (R. 1) whose oath was taken by a Mr. Gonzales, Clerk of the Court (R. 2).

The pertinent provision of the Code of Criminal Procedure of Puerto Rico, 34 L.P.R.A. 34 (See Appendix C, p. 26) provides in essence that the district attorney who files the information shall have himself either sworn the witness or heard their testimony before an examing magistrate and that he solemnly believes there is just cause for filing the information.

The petitioner in this case was found guilty on all charges (R. 10) and was sentenced to concurrent sentences of six months on each complaint.

Argument

1. A policeman, one Hector M. Calero, entered the private home of the petitioner in Cabo Rojo, Puerto Rico, while on official police business in order to gather evidence against the petitioner of violation of the Bolita laws in order to prosecute the petitioner at some later date which in fact did happen. As stated above, he was found guilty and sentenced to jail. This policeman was in civilian clothes with his true identity hidden (being on a confidential mission —R. 3) and had instructions not to make any arrests for offenses committed in his presence so that his purpose and identity could remain secret. Thus, he could "obtain evidence against the greatest number of persons possible" (R. 3) before having to give up his spying and going before an examining magistrate.

Clearly, Mr. Calero was neither "an undercover agent" nor a "stool pigeon" as those phrases were used in *On Lee v. United States*, 343 U.S. 747 at 749. Mr. Calero was actually a police officer (even though he may also have been

serving in the dual capacity of "an undercover agent"). The question resolves itself to whether or not it is a trespass for a police officer to enter a private home with his true identity kept a secret for the purpose of obtaining evidence to be used at a subsequent criminal trial against the citizen who owns the home. Petitioner submits that this is in fact a trespass and is within the interdiction of the Fourth Amendment regardless of whether the officer gained admission by affirmative fraud or by passive non-disclosure.

THE FACTS OF THIS CASE ARE SUCH AS TO CALL FOR THIS COURT TO EITHER OVERRULE THE *On Lee* CASE OR TO LIMIT IT TO ITS FACTS.

Further, the time is now ripe to carry the case of *Frank* v. *Maryland*, 359 U.S. 360 to a conclusion by answering the question not raised by the facts and left open in the majority opinion, i.e., what would the result have been had the inspector been there to gather evidence for a criminal prosecution rather than for the health of the community.

The search conducted in this case is far more insidious by reason of its nature than those conducted and disapproved of in *Johnson* v. *United States*, 333 U.S. 10, where the officers identified themselves and were admitted; and in *Nueslein* v. *District of Columbia*, 115 F.2d 690, C.A.D.C. (1940), where officers investigating an accident entered the defendant's home and obtained a confession from him. By way of analogy, this case can be more closely compared to *Gouled* v. *United States*, 255 U.S. 298, where admission to defendant's office was gained by stealth (although admittedly in the absence of the defendant); *Fraternal Order of Eagles* v. *United States*, 57 F.2d 93 (1932), where entry was gained without a warrant by the officers representing themselves as members of another Lodge of Eagles; and *United States* v. *Reckis*, 119 F. Supp. 687, D.C.D. Mass.

(1954) where agents gained entrance without a warrant by representing that they were sent by the "boss" to fix the still.

Certainly, the fact that Officer Calero turned up evidence of Bolita gambling after he gained entrance to petitioner's home does not make the search lawful. See *United States* v. *Di Re*, 332 U.S. 581, 595; *Henry* v. *United States*, 361 U.S. 98, where this Court said at P. 104:

> "To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."

The Supreme Court of Puerto Rico rejected the petitioner's contentions about search and seizure essentially on two grounds: 1) that there was no search, and 2) that there was a waiver by way of implied invitation for the officer to enter (R. 38-40). Of course, the Court of Appeals, by rejecting the appeal in a Per Curiam opinion, does not make its position on the question known. The Puerto Rican Supreme Court cites *On Lee* but fails to distinguish between an "undercover agent" or "stool pigeon" entering a laundry on the one hand and a police officer entering a private home on the other. Petitioner submits that not only is there a difference, but an important one. One of the very foundation stones of this basic freedom from uncontrolled invasion of his privacy is that a citizen need not fear that someone seeking entrance to his home is a disguised police officer performing official duty. As stated by Mr. Justice Douglas in his dissent in *Frank* v. *Maryland*, 359 U.S. 360 at 381-382: "It does not make the home a place of refuge from the law. It only requires the sanction of

the judiciary rather than the executive before that privacy may be invaded."

On the issue of whether the search must involve some thing tangible as distinguished from intangible, Mr. Justice Stewart, speaking for this Court without dissent, said in *Silverman* v. *United States*, 365 U.S. 505 at 511-512:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. . . . This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, *there secretly observe or listen*, and relate at the man's subsequent criminal trial what was seen or heard." (Emphasis added)

In *Nueslein* v. *District of Columbia*, 115 F.2d 690, the Court said at P. 692:

> "The crucial thing 'found' in this 'search' was a declaration of fact by the defendant which has become decidedly incriminating."[2]

See also *Fraternal Order of Eagles, No. 778* v. *United States*, supra, (57 F.2d 93) at P. 94; and *McGuinness* v. *United States*, 227 F.2d 598, where Judge Hartigan speaking for this same First Circuit Court said at P. 603:

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[2] On pp. 19-20 of its brief in the *On Lee* case, the Government argued that the confession in *Nueslein* was the illegal fruit of an unlawful search and that the search by the entry of a private dwelling without a warrant is what was held to be illegal and not the "listening to the accused as he confessed to the crime". Petitioner does not entirely agree with this but it is immaterial to this case where the policeman both entered the private dwelling without a warrant and then observed gambling activity.

> "We find no basis in the cases or in logic for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed. We are aware of no case which makes this distinction."

In *On Lee v. United States*, 343 U.S. at 753-754, Mr. Justice Jackson said:

> "... Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if Agent Lee had been eavesdropping outside an open window."

The question not raised there and therefore left unanswered, and which the petitioner now asks this Court to answer, is: What would be the situation if Agent Lee had gone inside with Chin Poy and heard the conversation, or to carry it one step further, and make it almost like the case at bar, what would have been the result had Agent Lee gone in himself and acted as the undercover agent?

Petitioner recognizes and realizes that the government may use artifice and stratagem in obtaining evidence and such conduct alone would not entitle the petitioner to a suppression of the evidence. However, carrying artifice out to the point of physically invading a private dwelling is "dirty business" which ought not to be allowed. It is fraught with every danger and vice that could ever be conceived and against which the Constitution was created to protect. As Mr. Justice Frankfurter said in his dissent in *On Lee* (343 U.S. at 758):

> "The law of this Court ought not to be open to the just charge of having been dictated by the 'odious doctrine,' as Mr. Justice Brandeis called it, that the end justifies the reprehensible means."

No appeal to "necessity" can be made in this case "because of their [Bolita offenses] essential clandestine characteristic would remain unpunished if said method were not used. . . ." (R. 41) This type of argument was answered precisely in *United States* v. *Di Re*, 332 U.S. 581, 595:

> "We meet in this case, as in many, *the appeal to necessity*. It is said that if such searches and arrests cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, *which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.*" (Emphasis added)

Mr. Justice Jackson said quite aptly in his dissent in *McDonald* v. *United States*, 335 U.S. 451, 459-460, in speaking of number pools:

> "It is to me a shocking proposition that private homes . . . may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. . . . *While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures.* When an officer undertakes to act as his own magistrate, he

ought to be in a position to justify it by pointing to some real, immediate and serious consequences if he postponed action to get a warrant." (Emphasis added)

We could come to the shocking proposition that if a policeman can lawfully enter a private dwelling for the purpose of securing "information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property", *Frank v. Maryland*, 359 U.S. 360, 365, without a warrant because he is acting as an undercover agent, then police will not bother to get warrants and will not identify themselves as police officers. Cf. *Johnson v. United States*, supra, (333 U.S. 10). See in this respect, *Wrightson v. United States*, (C.A.-D.C. (1955), 222 F.2d 556, where Judge Prettyman said at P. 559:

> "To hold that a search warrant cannot issue except upon probable cause shown under oath, but that a search can be made without any factual demonstration of probable cause so long as it is made without a search warrant, would be a deliberate circumvention of the constitutional prohibition. . . ."

The rationale of the *On Lee* and *Frank* cases militate against this type of invasion of privacy in a dwelling which is guaranteed by our Constitution.

We next come to the question of waiver based on what the Supreme Court of Puerto Rico called "an implied in-

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[1] The only reason in this case for not getting a warrant is so the police could get evidence on the most number of people. This is certainly no reason under the civilized standards of English and American law. This concept is not just "dirty-business"; it is vulgar and abhorrent.

vitation" (R. 40). The first consideration here is that courts indulge in every reasonable presumption against waiver of constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464. If the Government seeks to be exempt from acts prescribed by the Fourth Amendment, then the burden of proof is on the Government to show it is entitled to an exemption. See *United States v. Jeffers*, 342 U.S. 48, 51. To show a waiver, the burden is on the government to show by clear and convincing evidence that the waiver was unequivocal and specific and freely and intelligently given. See *United States v. Martin*, D.C.S.D.N.Y. (1959), 176 F. Supp. 262, 266-267; *Nardone v. District of Columbia*, 115 F.2d 690 at 694.

Going from these governing principles to the facts of this case, the government of Puerto Rico admitted or stipulated that a police officer, dressed as a civilian and with his identity kept secret, entered the home of the petitioner without a search warrant for the purpose of gathering evidence against him concerning criminal activities. In turn, this evidence was to be submitted to an examining magistrate (R. 3). Up to here, we have the very type of conduct which this Court held, in effect unanimously in the *Frank* case, was forbidden by the Fourth Amendment, especially as it relates to the Fifth Amendment by giving evidence against oneself.

The petitioner filed a timely motion for suppression of the evidence which the police officer obtained in the dwelling, alleging that "defendant's residence was illegally and wrongfully invaded and searched by an officer of the Commonwealth of Puerto Rico . . . without said officer having presented any warrant issued therefor by competent authority, thereby violating the constitutional rights of the defendant to the protection of his person, residence and belongings against unreasonable and wrongful searches and seizures and his right to the privacy of his home" (R. 8).

At that point, the burden of proof was on the Commonwealth to show by "clear and convincing evidence" that the petitioner had clearly, intentionally, and unequivocally waived his constitutional right. The petitioner submitted that there was no evidence of such a waiver, as indeed there could not have been.

The Supreme Court of Puerto Rico, in its opinion, based its finding of waiver on [petitioner's] action in permitting the policeman to enter" (R. 39) and "because the policeman was there on seventeen occasions to bet on the same number, and that he did so because the defendant consented" (R. 40). During oral argument before the Court of Appeals, the Justices there took the same position, i.e., that the fact that the police officer was there on 17 occasions shows that he must have been invited inside with the consent of the petitioner. The error in the position taken by each of the courts below is that this conclusion of implied invitation *presupposes the lawfulness of the first visit.* In *Go-Bart*, Mr. Justice Jackson, speaking for the court, discussed the doctrine of trespass ab initio (281 U.S. at 356) and said it has no application to criminal law.

Therefore, just as a lawful entry is not made unlawful by subsequent conduct as a criminal case, the converse is also true: an unlawful entry cannot be made lawful by any subsequent conduct.[1] There is utterly no evidence in this case to show the initial entry was lawful. To the contrary, the only reason that this trespassing police officer was al-

[1] In its Brief before the Court of Appeals, the Commonwealth argued:

> "It is more consonant with logic to suppose that, if a person visits another's residence on seventeen occasions, and once there is, the dweller engaged in certain illegal activities with the visitor, the latter does it with the full and total consent and acquiescence of the former."

This is the same view as was taken by both courts below. Actually, it is irrelevant whether it was 17 or 70 visits. This policeman was a trespasser and remained on

lowed or able to go into that private home on so many occasions (and it would be no different if the figure were 117 instead of 177) is just because of the very fact THAT HE DID NOT GET A SEARCH WARRANT. When one stops to realize that had this policeman obtained a warrant as required by law, he would have served it, made his return on it, and filed it back in court. Then, of course, THERE NEVER COULD HAVE BEEN MORE THAN ONE VISIT.[5] In other words, what both courts below have condoned is to allow a police officer to go further without a warrant than he could have done with a warrant. See *Wrightson v. United States*, C.A.D.C. (1955) 222 F.2d 556. Therein lies the real "dirty business" which the Supreme Court of Puerto Rico very much mistakenly refers to as "entrapment" (R. 41). This is far worse than entrapment; this is setting up a trap in order to cause a man to incriminate himself within his own home —conduct prohibited by the Fourth *AND* the Fifth Amendments. Entrapment is nowhere near as "dirty" as this conduct. The court below could not have been further off base than it was when it discussed this conduct under the topic of "entrapment". In other words, this was not a case of entrapment at all but rather is an application of the Fifth Amendment as it applies to the Fourth Amendment, which was discussed by Mr. Justice Frankfurter speaking for the Court in *Frank v. Maryland*, supra.

The petitioner respectfully submits that there was an unlawful search conducted in this case and no issue of waiver of rights is shown to exist. The importance of this case, as it relates to the *On Lee* and *Frank* cases, fairly requires the granting of this writ. The petitioner, as a

[5] It is for this very same reason that the two occasions mentioned by the court below (R. 33, n. 2) also come within the exclusionary rule. Without a warrant, the cycle could have gone on *ad infinitum*. This was clearly the poisoned fruit of the unlawful search. It is too basic to require argument here that the by-product of an unlawful search by the police is equally unlawful and will therefore also be suppressed.

citizen of Puerto Rico, enjoys all the protections of the Due Process and Search and Seizure provisions of the Fourth and Fifth Amendments. See *Mora* v. *Mejias*, 206 F.2d 377, 382; *Fournier* v. *People of Puerto Rico*, 281 F.2d 888, 891; *Colon-Rosich* v. *People of Puerto Rico*, 256 F.2d 393, 397; *Mapp* v. *State of Ohio*, 367 U.S. 643 (1961).

2. Violation of the section of the Bolita law that the petitioner is charged with is a misdemeanor for a first offense (R. 37-38). The relevant section of the Act is set out in full in Appendix C, infra, p. 25. It should be noted here that the date of the first offense was May 9, 1959, and the date of the last offense was September 12, 1959 (R. 33, n. 2). The date of the filing of the information was December 18, 1959 (R. 2, 37). In other words, *more than seven months* elapsed from the date of the last violation charged and the the filing of the information, and more than three months elapsed from the date of the last violation charged and the filing of the information.

During all that time, the government had both knowledge of the identity of the alleged offender as well as evidence of the commission of the crime from the testimony of Officer Calero. The petitioner was at all times available to be served with process.[5] Nevertheless, the government, for reasons of its own, failed to issue process for almost seven months after the commission of the first offense charged. Here again, it must be noted that had the policeman obtained a search warrant the first time he went into petitioner's home, this situation could not have arisen in the manner in which it did.

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[5] This situation is to be distinguished from one involving the statute of limitations, which involves a cut-off date after which the government cannot prosecute if; within the time allowed, it has no knowledge of the identity of the offender or has no evidence with which to prosecute or is unable to find the offender (with certain exceptions not relevant here). The question presented here can be compared by way of analogy to laches or estoppel as related to the right to a speedy trial.

It is submitted that in relatively minor type offenses which are repetitive in nature and have no particular significance attached to them by way of memory stimulation, such as speeding on an expressway used daily or taking bets on a numbers lottery, such a very long delay in issuing process as is here presented under the facts of this case is in and of itself prejudicial. The petitioner filed a timely motion to dismiss based on alleged violation of his constitutional rights in this respect (R. 3-4).

The Supreme Court of Puerto Rico, in its opinion, makes much of the fact that the petitioner rested his case on the constitutional questions and did not present any evidence on his behalf (as indeed he is not required to do). This is not so hard to understand when an experienced judge or trial lawyer takes into consideration that the petitioner was denied a trial by jury under the statute (R. 38 n. 7), and that sentences can run consecutively as well as concurrently.

Assuming that a daily user of an expressway in and out of a large city admits that he frequently exceeds the speed limit or that a Bolita fixer regularly takes number bets, how can such a person come into court and honestly plead to a charge that he exceeded the speed limit on a date more than seven months ago or that he sold a certain number on a particular date more than seven months ago. Certainly, there would be no chance of establishing an alibi for that date unless, by a pure miracle or stroke of luck, some event occurred which was recorded in some records somewhere that would establish an alibi. As to the past seven days, a person with a good memory might perhaps be able to account for all of his time and locate where he was on each day at any particular time, but as to seven *months* ago, this is all but impossible.

So, at a trial in a case like this where it is held without a jury, a defendant is faced with the proposition of coming into Court and saying that the affidavit of the policeman

is false, where the police officer will testify that he kept a meticulously detailed daily log of his "undercover" activities. The defendant then has not only no chance of an acquittal but runs a very grave risk of a severe sentence. This need not be spelled out any further. If this same Puerto Rican citizen had been arrested for a misdemeanor involving a trial in the Federal District Court in San Juan, he would be entitled a trial by jury on any criminal charge. It is absolutely monstrous that a delay like this can be sanctioned where there is no right to a trial by jury as any mainland citizen of the United States would get.

Moreover, the Bolita statute states unequivocally that an offender "shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information" (App. C, p. 25). The Supreme Court of Puerto Rico brushed off the word "immediate" as having "rather a grammatical than a legal force" (R. 36). In other words, the court held that when the legislature used the word "immediate", it did not mean "immediate". Admittedly, "immediate" does not mean the exact second of the occurrence. *United States* v. *Bell*, D.C.S.D. Cal. (1943) 48 F. Supp. 986, 994, but certainly, it does not mean seven months either. Ordinarily, penal statutes are to be construed strictly in favor of an accused: "Where there is no ambiguity in the words, there is no room for construction." *Yates* v. *United States*, (1956) 354 U.S. 298, 305; *Arroyo* v. *United States*, (1958) 359 U.S. 419, 424. See also 2 Sutherland on Statutory Construction, 3rd Ed., 4705.

In this case, the only reason for the long delay again was to get the most possible people inside the dragnet. One wonders whether the investigation was conducted to stamp out Bolita gambling or to send as many people as possible to jail or both. To do this, the government wanted to keep the identity of the police officer as such a secret so he could

continue his undercover work. They can do this if they wish, but the price may be to let "the defendant go free", *Jencks* v. *United States*, (1956), 353 U.S. 657, 671. The right of a *potential* defendant to a speedy trial is discussed generally in 5 Stan. L. Rev. 95, Justice Overdue, Speedy Trial for the Potential Defendant. In *Harris* v. *Municipal Court*, 209 Cal. 55 (1930), the Court said at P. 60 that this right (of a potential defendant) is embodied in the Sixth Amendment. The Court held that prejudice will be presumed from the violation of the constitutional right unless the government shows good cause for the delay.

Petitioner respectfully submits that this issue of the right of a potential defendant to a speedy trial is important enough to require issuance of the writ sought. Petitioner knows of no case in this Court in which this question has been decided. There would seem to be a requirement of due process that the statute be strictly construed, especially where there is no right to a trial by jury. Procedural safeguards are the foundation stones of a free society.

3. Officer Calero stated in his affidavit (R. 2-3) that he could not present physical evidence in court because he was not given a ticket. He testified he observed the defendant enter numbers on a piece of wrapping paper, "all of said numbers being used in the illegal game of Bolita" (R. 3). The Supreme Court of Puerto Rico stated that the "primary" or "material" evidence did not have to be produced because the defendant did not give him a ticket, because the defendant could not have been compelled to deliver any incriminatory evidence in his possession, and because the defendant chose not to present any evidence but rather to rely on the questions of law presented (R. 41-44). Before the Court of Appeals, the Government argued that, in any event, testimony by the officer of what he saw constitutes primary evidence. See 2 Wharton's Criminal Evidence, p. 481 §594 and p. 501 §607.

Neither position, however, is precisely the issue sought to be raised by the petitioner. The issue sought to be raised is one of procedural due process. Again, reverting to Questions 1 and 2, if the police officer had obtained a search warrant and "immediately" arrested the petitioner upon seeing an offense committed, the piece of wrapping paper would have been seized and therefore been available for judicial inspection. Mr. Calero said he saw petitioner write down three-digit numbers followed by a dash and "other numbers" to the right (R. 3). Without seeming to be trite, the numbers "760-15" or "800-14" describe automobile tire sizes and presumably, a person writing a list of tire sizes on a piece of wrapping paper would not be prosecuted as a numbers bookie. To paraphrase the words of this Court in a search warrant case involving obscene literature, the failure to obtain the wrapping paper for judicial inspection[7] leaves the convictions to rest on "the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be [used for Bolita gambling]". *Marcus v. Search Warrant*, 367 U.S. 717, 732. Too much discretion in the police lacks sufficient safeguards "to prevent erosion of the constitutional guaranties". 367 U.S. at 733.

In other words, petitioner here asserts that adherence to the requirements of procedural due process would have produced the "hard" evidence for the court to scrutinize.

4. The purpose of proceeding by information is to avoid the necessity of convening grand juries to hear and indict

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[7] Despite intimations by the court below that petitioner could have produced the wrapping paper himself, it is not a shocking thought that in the several months that elapsed before he was made aware of the fact that a policeman had been watching him in his own home, the piece of wrapping paper could have been destroyed. There is nothing spectacular about a piece of wrapping paper. This again points up the need for a warrant and an immediate arrest.

petty crimes. The informations must be sworn to as set out in 34 L.P.R.A. 127 as follows:

> "I hereby certify that the above information is filed based upon the sworn testimony of *witnesses examined before me*, and *I* do solemnly *believe* that there is just cause for the filing of this information." (Emphasis added)

In this case, the witness was examined by one Limeres and the information was sworn to by one Mangual (R. 2). The court below said that "the Legislature apparently required that the information be supported by sworn statements in order to offer a greater guarantee with respect to the accusatory system" (R. 35). However, the court felt that the phrase, "the prosecuting attorney" in 3 of Title 34 (App. C, p. 26) refers to the generic concept of "representative of the state" (R. 35). Certainly, a defendant would be deprived of due process if an indictment showed on its face that the evidence was heard by one grand jury and that the indictments were voted (without re-presentation of the evidence) by a subsequent grand jury. The information procedure as a substitute for the grand jury procedure, should be clothed with as many safeguards as the grand jury. How can one prosecutor swear under oath that another prosecutor who examined the witnesses had such solemn belief, or at least, how can we be sure of it? It is equally inferable that the examining prosecutor did not have the requisite belief and that is why he did not sign the affidavits.

The protection afforded citizens by these statutes (against arbitrary prosecution) is lost under the view adopted by the Supreme Court of Puerto Rico as to the requirements of the statutes. This violates fundamental principles of due process and is therefore patently erroneous.

Petitioner is fully aware of the principles governing the issuance of a writ of certiorari. Perhaps Questions 3 and 4, either alone or even taken together, would not warrant issuance of the writ. However, taken against the background of the entire case, the writ should issue on all the questions on the issue of due process. In *Betts v. Brady*, 316 U.S. 455, this Court said at P. 462:

> "The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. *Asserted denial is to be tested by an appraisal of the totality of facts in a given case.* That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. . . ." (Emphasis added)

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MELVIN S. LOUISON
LEONARD LOUISON
8 Taunton Green
Taunton, Massachusetts
Attorneys for Petitioner

Of Counsel:
YAMIL GALIB-FRANGIE
San German, Puerto Rico

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5900.

LIBRADO SEDA ALVAREZ,
DEFENDANT; APPELLANT,

v.

THE PEOPLE OF PUERTO RICO,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO

Before WOODBURY, *Chief Judge*, and ALDRICH and GANEY,* *Circuit Judges*.

OPINION OF THE COURT
March 1, 1962.

PER CURIAM. This is an appeal from a judgment of the Supreme Court of Puerto Rico affirming a judgment of sentence entered by the Superior Court of Puerto Rico, Mayaguez Part. It presents no substantial question of constitutional right nor serious question of interpretation of local law.

Judgment will be entered affirming the judgment of the Supreme Court of Puerto Rico.

*By Special Assignment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5900.

LIBRADO SEDA ALVAREZ,
DEFENDANT, APPELLANT,

v.

THE PEOPLE OF PUERTO RICO,
APPELLEE.

JUDGMENT
March 1, 1962

This cause came on to be heard on appeal from the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

[cc. Messrs. Louison and Segarra Olivero]

APPENDIX C

CONSTITUTION OF THE UNITED STATES:

Fourth Amendment:—

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:—

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:—

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining wit-

nesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment:—

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act 220 of May 5, 1948, Sec. 4 (33 L.P.R.A. 1250):—

Any person caught carrying or transporting or who has in his possession for any reason any papeleta, billete, ticket, notebook, list of numbers or letters, slips; or implements which can be used for the unlawful games of bolita, bolipool, combinations connected with the pools or bancas of the race tracks of Puerto Rico, and clandestine lotteries, and any person who possesses, sells, or in any way transports these or any other similar ones which may be utilized or used in said unlawful games or connected with the practice thereof, shall be guilty of a public offense and shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information. Such person shall, upon conviction, be punished by imprisonment in jail for a term of not less than six (6) months or more than two (2) years; and for the second and subsequent violation, shall be punished by imprisonment in the Penitentiary for not less than one (1) year nor more than ten (10) years. Pro-

vided, That all trials for violations of the provisions of sections 1247-1257 of this title shall be heard in the Superior Court by the court without a jury, exclusively, and the judges of the Superior Court of Puerto Rico are hereby directed to give preference to the hearing of all cases involving a violation of any of the provisions of section 1247-1257 of this title.

Code of Criminal Procedure, Sec. 3 (34 L.P.R.A., 3):

Every offense of which the Superior Court has original jurisdiction must be prosecuted by information filed by the prosecuting attorney, in open court, verified by his affidavit, which shall be sufficient if it states that the information is based upon the testimony of witnesses, sworn before him, or upon the testimony of witnesses taken before an examining magistrate, and that he solemnly believes that there is just cause for filing the information.